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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

TANGIE TERRELL, as Administrator, etc., Plaintiff and Respondent, v. DILLINGHAM & MURPHY, LLP, et al., Defendants and Appellants.	A124094 (Contra Costa County Super. Ct. No. C08-02940)

Defendants John Hartley, Edward Hartley and the law firm of Dillingham & Murphy, LLP appeal from an order denying their special motion to strike the malicious prosecution action filed by Tangie Terrell individually and as administrator of the estate of Christina Ryan. The parties agree that defendants made the requisite threshold showing that Terrell's malicious prosecution action arises from protected activity but they dispute whether Terrell demonstrated a probability of prevailing on her claim. Having reviewed the pleadings and the evidence submitted, we conclude that Terrell has not made a prima facie showing that John Hartley's action for damages and rescission, based on his claim that misrepresentations were made to him in connection with his purchase of a mobile home from Ryan, was filed without probable cause. Accordingly, we shall reverse.

Factual and Procedural Background

On January 10, 2006, John Hartley purchased a mobile home from Christina Ryan for $30,000 in cash and a $5,000 promissory note. On March 14, 2006, Ryan filed a small claims action against Hartley to enforce the promissory note. On April 25, 2006, the

small claims court entered judgment in favor of Ryan for $2,550, representing the $5,000 due on the note less what the small claims court estimated the cost to be of repairing the defects in the mobile home that were not disclosed. Hartley filed a notice of appeal from the judgment, but subsequently abandoned the appeal.

In the meantime, on May 31, 2006, Hartley, represented by his cousin Edward Hartley and the law firm Dillingham & Murphy, filed a limited jurisdiction action against Ryan and her daughter Terrell for breach of contract, negligence and fraud. The complaint alleged that Terrell was acting as an agent for Ryan when she made misrepresentations regarding the condition of the mobile home, specifically that the mobile home had a new roof, that a swamp cooler was in good working condition, that there were no leaks in the home, and that the carpets would be cleaned and personal property removed from the premises prior to transferring possession. The complaint alleged that the estimated cost of repairing those items was $14, 895.84. In December Hartley moved to amend his complaint to add a cause of action for rescission. When the motion was denied, he dismissed the action without prejudice and filed a new complaint as an unlimited jurisdiction action making the same allegations but with an added cause of action for rescission. On March 3, 2008, subsequent to Ryan's death, Hartley dismissed the second action with prejudice.

In November Terrell filed the present malicious prosecution action against Hartley and his attorneys, claiming that Hartley's two actions, both of which he ultimately dismissed, were prosecuted maliciously and without probable cause. Defendants filed a special motion to strike under Code of Civil Procedure section 425.16, the so-called anti-SLAPP (strategic lawsuit against public participation) statute.[1] The trial court denied the motion on the ground that Terrell had demonstrated a sufficient likelihood of prevailing on her claim. Defendants filed a timely notice of appeal.

[1] All statutory references are to the Code of Civil Procedure unless otherwise noted.

Discussion

Section 425.16 provides, inter alia, that "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (*Id*., subd. (b)(1).) "As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law . . . ." (*Id*., subd. (e).)

The California Supreme Court has summarized "a court's task in ruling on an anti-SLAPP motion to strike as follows. Section 425.16, subdivision (b)(1) requires the court to engage in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute. [Citation.] If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Equilon Enterprises v. Consumer Cause, Inc*. (2002) 29 Cal.4th 53, 67.) "To establish a probability of prevailing, the plaintiff 'must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.' [Citations.] For purposes of this inquiry, 'the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant [citation]; though the court does not weigh the credibility or comparative probative strength of competing

evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim.' [Citation.] In making this assessment it is 'the court's responsibility ... to accept as true the evidence favorable to the plaintiff. . . .' [Citation.] The plaintiff need only establish that his or her claim has 'minimal merit' [citation] to avoid being stricken as a SLAPP." (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291 (*Soukup*).) In reviewing the ruling on defendants' special motion to strike we use our independent judgment, examining the motion under the same standards as the trial court. (*Sylmar Air Conditioning v. Pueblo Contracting Services, Inc*. (2004) 122 Cal.App.4th 1049, 1056.)

The parties agree that defendants satisfied their initial burden of showing that this action arises from protected activity. (See *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 735 ["By definition, a malicious prosecution suit alleges that the defendant committed a tort by filing a lawsuit"].) Accordingly, the question is whether Terrell has shown a probability of prevailing on her claims.

"To prevail on a malicious prosecution claim, the plaintiff must show that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination favorable to the plaintiff; (2) was brought without probable cause; and (3) was initiated with malice." (*Soukup, supra,* 39 Cal.4th at p. 292.) We consider the evidence proffered on each element in turn.

Favorable Termination

If the underlying action is not terminated by a judgment "the court examines the record 'to see if the disposition reflects the opinion of the court or the prosecuting party that the action would not succeed. If resolution of the underlying action leaves a residue of doubt about the plaintiff's innocence or liability, it is not a favorable termination sufficient to support a cause of action for malicious prosecution.' " (*Wilshire-Doheny Associates, Ltd. v. Shapiro* (2000) 83 Cal.App.4th 1380, 1391.) " '[I]n order for the termination of a lawsuit to be considered favorable to the malicious prosecution plaintiff, the termination must reflect the merits of the action and the plaintiff's innocence of the

misconduct alleged in the lawsuit.'" (*Casa Herrera Inc. v. Beydoun* (2004) 32 Cal.4th 336, 342.) "A voluntary dismissal is presumed to be a favorable termination on the merits, unless otherwise proved to a jury." (*Sycamore Ridge Apartments, LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1400.) The presumption arises from "the natural assumption that one does not simply abandon a meritorious action once instituted." (*Minasian v. Sapse* (1978) 80 Cal.App.3d 823, 827.)

Defendants argue that the dismissal of their prior actions was not a reflection on the merits of their case. The first action was dismissed without prejudice to permit Hartley to file a new action that included a claim for rescission, and the second action was dismissed with prejudice because Hartley believed he no longer had a viable remedy in light of the facts that the mobile home had been resold and Ryan had died. For those reasons he concluded that "the litigation expense of continuing to pursue his claims would outweigh any expected recovery." In response, Terrell relies largely on the presumption that a voluntary dismissal with prejudice is a favorable termination. She adds, however, that the fact that Hartley delayed five months following her mother's death to dismiss the action suggests that the dismissal was unrelated to Ryan's death.

Defendant's explanation of his motivation for dismissing the second action might be sufficient to prevail at trial. However, it does not conclusively rebut the presumption on which Terrell relies. Terrell has presented a prima facie showing that the underlying litigation was terminated in her favor, sufficient to overcome the anti-SLAPP motion.

Lack of Probable Cause

The same cannot be said of her showing that Harley's complaints were filed without probable cause. "The question of probable cause is 'whether as an objective matter, the prior action was legally tenable or not.' [Citation.] 'A litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a legal theory which is untenable under the facts known to him.' [Citation.] 'In a situation of complete absence of supporting evidence, it cannot be adjudged reasonable to prosecute a claim.' [Citation.] Probable cause, moreover, must exist for every cause of action advanced in the

underlying action. '[A]n action for malicious prosecution lies when but one of alternate theories of recovery is maliciously asserted. . . .' " (*Soukup*, *supra*, 39 Cal.4th at p. 292.)

Terrell asserts that Hartley's fraud cause of action lacked probable cause because her alleged misrepresentations were essentially too vague to be actionable. Hartley's complaint alleged, among other things, that Terrell falsely represented that the trailer had a "new roof," a swamp cooler was in good working condition, and there were no leaks throughout.[2] Terrell asserts in her declaration that she told Hartley "about the 1998 roof work . . . , that as far as [she] knew the old swamp cooler was still working . . . [and] that the home did not leak anywhere that I knew of." She argues that "[n]o reasonable attorney would consider a fraud claim to be viable against the seller of a used mobile home, and there were no warranties, express or implied." With respect to the roof, Terrell argues that it is unclear what "she meant by 'new'? [Defendants] did not allege that she said the roof was replaced one week before, one month before, one year before. The purported statement could easily have meant that the roof was 'new' relative to the rest of the home, that is, that it had been redone sometime since Ryan acquired it." With respect to the lack of leaks, Terrell asserts, "[defendants] had no evidence that she meant there had never been any leaks. Their claim of falsity rests solely on indications that there had been leaks at one time." Terrell makes no argument with regard to the swamp cooler, except to suggest that "a reasonable lawyer would not think tenable an allegation that Ryan, who did not live there, specifically promised – as a material term – in the middle of winter – that the old swamp cooler was working well."

We do not agree that Terrell's statements regarding the condition of the property are too uncertain to form the basis of a fraud claim. Terrell does not dispute Hartley's

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[2] Hartley also alleged that Terrell's promises to clean the carpets and remove all of her personal property before he took possession were false. Terrell argues that these promises are not actionable under a fraud theory because defendants could not prove that she did not intend to follow through at the time she made the promises. We need not determine whether these particular promises were actionable because, for the reasons discussed in text, defendants had probable cause to assert a fraud cause of action based on the remaining allegedly false representations.

assertion that there were in fact leaks in the mobile home, that the swamp cooler was not in good working condition, and that the roof was at least eight years old.[3] While Terrell's explanations might well have been sufficient to defeat Hartley's fraud claim on the merits, they provide no basis to infer that there was no reasonable basis for him to believe that his allegations were true or that his legal theory was untenable.

With respect to Hartley's cause of action for breach of contract, Terrell argues that his claims lacked probable cause because "even if Hartley could show that Ryan breached he would not be able to recover because he himself had breached the contract." Terrell relies on the small claims judgment, which is included in the record, showing that Hartley was ordered to pay Ryan $2,550.00. Terrell properly disclaims any suggestion that there could be no probable cause because of a res judicata or collateral estoppel effect of the small claims judgment. (*Rose v. DeSoto Cab Co.* (1995) 34 Cal.App.4th 1047.) She asserts, however, that the small claims judgment demonstrates "the worth of Hartley's claims and that he himself was in breach of the sales agreement. The judgment also showed . . . that Hartley already had been compensated [and] [t]he most their subsequent re-litigation could accomplish would have been an impermissible double recovery for Hartley." According to Terrell's declaration, "Hartley defended against [Ryan's] claim by alleging that the mobile home had a leaky roof, soiled carpet, an unstable porch and other problems" and the small claims court "reduced the amount owed [to Ryan] to account for Mr. Hartley's claimed problems with the mobile home." However, Hartley claimed damages of almost $15,000, substantially more than the amount by which his obligation under the promissory note had been reduced in the small claims proceedings. The fact that Hartley failed to make payment on the promissory note

[3] Nowhere in Terrell's declaration does she deny the allegations in Hartley's complaint that "the property: (a) did not have a new roof; (b) the swamp cooler was inoperable and had leaked around the surrounding ceiling area in which it was located; (c) there was obvious evidence of water leakage in the living room of the property, as evidenced by the condition of the wall . . . and the underlying floor . . . ; two electrical outlets immediately proximate to the area where the floor showed obvious signs of water leakage were inoperable; (d) the front porch showed obvious signs of water damage . . . ."

based on his damage claim, and that the small claims court offset only a portion of the amount of his claimed damages, does not preclude him from pursuing a civil action for the full amount of the damages he alleged. (*Ibid.*)

Terrell contends that Hartley's action lacked probable cause because his "entire case rested on inadmissible parol evidence." She argues that her alleged oral statements regarding the condition of the trailer, on which all of Hartley's claims were based, were inadmissible and "irrelevant as a matter of law." We disagree.

"The parol evidence rule is codified in Civil Code section 1625 and Code of Civil Procedure section 1856. [Citation.] It 'generally prohibits the introduction of any extrinsic evidence, whether oral or written, to vary, alter or add to the terms of an integrated written instrument.' [Citation.] The rule does not, however, prohibit the introduction of extrinsic evidence 'to explain the meaning of a written contract . . . [if] the meaning urged is one to which the written contract terms are reasonably susceptible.' " (*Casa Herrera, Inc. v. Beydoun*, *supra*, 32 Cal.4th at p. 343.) In *Casa Herrera, Inc.*, the court held that termination of a civil action based on the parol evidence rule "constitutes a favorable termination for malicious prosecution purposes." (*Id.* at p. 345.) The court noted that any "[c]oncerns over the potential chilling effect of our decision on breach of contract actions due to judicial confusion over the parol evidence rule are readily assuaged by stringent enforcement of the probable cause element of the malicious prosecution tort. [B]y requiring courts 'to make an objective determination of the "reasonableness" of the defendant's conduct' [citation] or to determine 'whether any reasonable attorney would have thought the claim tenable' [citation], the probable cause requirement adequately protects the breach of contract plaintiff's 'interest "in freedom from unjustifiable and unreasonable litigation." ' " (*Id.* at p. 348.)

In this case, the contract signed by the parties is a relatively simple document drafted by Ryan that does not contain an integration clause. It makes no mention of any

warranties nor does it state that the sale was "as is."[4] The parole evidence rule, even if applicable, does not prevent a party from proving that the agreement was induced by fraud. (*Danzig v. Jack Grynberg & Associates* (1984) 161 Cal.App.3d 1128, 1138.)Moreover, there is a substantial basis for the argument that the contract here is not integrated and, in all events, the alleged misrepresentations do not contradict any express language in the short written agreement. (See *Esbensen v. Userware Internat., Inc*. (1992) 11 Cal.App.4th 631, 638 ["It is hardly unnatural to think that [parties] unsophisticated in legal matters and unadvised by lawyers, might have discussed [the missing terms] and resolved them orally"].) Thus, the parole evidence rule provides no basis for concluding that Hartley's complaints lacked probable cause.

Terrell also asserts that Hartley's claims lacked probable cause because defendants cannot establish that she was acting as Ryan's agent. " 'An agent is one who represents another, called the principal, in dealings with third persons.'(Civ. Code, § 2295.) 'In California agency is either actual or ostensible. (Civ. Code, § 2298.) An agency is actual when the agent is really employed by the principal. (Civ. Code, § 2299.) An agency is ostensible when a principal causes a third person to believe another to be his agent, who is really not employed by him. (Civ.Code, § 2300.) [¶] An agent has the authority that the principal, actually or ostensibly, confers upon him. (Civ. Code, § 2315.) . . . Ostensible

[4] The document reads in full, "In considerations of $30,000.00 cash and $5,000.00 in a separate agreement this agreement is between Christina Ryan and Gerald Mathey hereafter known as the assignors and John Hartley a signee and entered into on this day January 10, 2006 in the city of Concord state of California Count of Contra Costa. Assignor does assign, grant and convey to an assignee any right, title, or interest either written or implied to all property whether considered real or personal currently located at 19 Lodge Dr. Concord, CA together with and described as follows. 1964 10' x 52' foot Redmond mobile home new moon. ID number FDS11471. License number aay5582. Furthermore power of attorney is assigned to assignee for any transaction pertaining to said properties. Assignee is to release assignor from responsibilities financial or otherwise in regard to said properties. This agreement is binding upon all heirs, executors, and personal representatives of both parties and becomes effective upon day of execution." Written in handwriting below this paragraph is the sentence "Seller also agreed to pay retro rent."

authority . . . is the authority of the agent which the principal causes or allows a third person to believe that the agent possesses. (Civ. Code, § 2317.)' " (*J.L. v. Children's Institute, Inc.* (2009) 177 Cal.App.4th 388.)

"If the principal authorizes an agent to enter into transactions in which representations about the subject matter are usually made (e.g., the sale of real property), and he should reasonably expect representations to be made on such matters as the location and condition of the property, the principal is liable to an innocent third person for misrepresentations on these matters." (3 Witkin, Summary of Cal. Law (10th ed. 2005) Agency, § 192, p. 245.) "Before recovery can be had against the principal for the acts of an ostensible agent, three requirements must be met: The person dealing with an agent must do so with a reasonable belief in the agent's authority, such belief must be generated by some act or neglect by the principal sought to be charged and the person relying on the agent's apparent authority must not be negligent in holding that belief. [Citations.] Ostensible agency cannot be established by the representations or conduct of the purported agent; the statements or acts of the principal must be such as to cause the belief the agency exists. [Citations.] ' "Liability of the principal for the acts of an ostensible agent rests on the doctrine of 'estoppel,' the essential elements of which are representations made by the principal, justifiable reliance by a third party, and a change of position from such reliance resulting in injury." ' " (*J.L. v. Children's Institute, Inc., supra,* 177 Cal.App.4th at pp. 403-404.)

In opposition to defendants' motion to strike, Terrell submitted a declaration in which she states, "I have never been on title as an owner of the mobile home which Mr. Hartley purchased from my mother, nor did I ever represent to Mr. Hartley or anyone else that I was a part owner of the mobile home." She explains further, "In January, 2006 my mother had the home up for sale. She was asking $45,000.00. One day John Hartley called and asked if he could come to see the home and he did. He examined the home thoroughly. My mother and I were there and I told Mr. Hartley what I knew about the home, having lived there for some time. I told him about the 1998 roof work and the bathroom remodel. I told him that as far as I knew the old swamp cooler was still

working since it was winter I had not used it for months. I told him that the home did not leak anywhere that I knew of. I do not recall if my mother was close enough to hear Hartley and I discussing the home or if she was paying attention." Terrell did not expressly deny that she was authorized to act as Ryan's agent for purposes of the sale.

However, in support of the motion to strike, Edward Hartley submitted a declaration attaching Hartley's complaint and discovery responses from the underlying litigation. Hartley's complaint alleged that Ryan was the owner and seller of the mobile home and that her daughter Terrell, who had been living in the trailer prior to the sale, "at all times was acting as the agent for, and within the authority granted, or ratified by . . . Ryan." In response to Terrell's special interrogatory requesting "all facts in support of [Hartley's] contention that . . . Terrell was acting as the agent of Christine Ryan" Hartley stated, "Ms. Terrell identified herself as Ms. Ryan's daughter and was the person who negotiated the transaction with [Hartley]. Ms. Terrell made the representations set forth in the complaint while her mother was present and let Ms. Terrell do all the talking. Ms. Terrell also lived in the property at the time." In a second interrogatory response he adds, "Ms. Ryan did not explicitly make the representations . . . . Ms. Ryan was present while such statements were made by her daughter, Ms. Terrell. Ms. Ryan heard such statements and voiced no objection or clarification to such statements. Further, at one point during their conversation, Ms. Ryan told [Hartley] not to worry about anything because she (Ms. Ryan) used to be a real estate agent." Defendants attached a copy of the California Department of Housing certificate of title listing Terrell as a registered legal owner of the mobile home.

Nothing that Terrell asserted in her opposition to the motion to dismiss provides a basis on which to find that under the circumstances described very similarly by both parties there was no reasonable basis to contend that Terrell was acting as Ryan's agent for the sale of the trailer. Thus, Terrell also failed to make a prima facie showing that Hartley's claims lacked probable cause in this regard.

In short, however compelling Terrell's showing may have been that her disclosures were adequate, they provide no basis to support a finding that Hartley's claims were made without probable cause to believe in their merit.

Malice

" 'The "malice" element . . . relates to the subjective intent or purpose with which the defendant acted in initiating the prior action. [Citation.] The motive of the defendant must have been something other than that of bringing a perceived guilty person to justice or the satisfaction in a civil action of some personal or financial purpose. [Citation.] The plaintiff must plead and prove actual ill will or some improper ulterior motive.' [Citations.] Malice 'may range anywhere from open hostility to indifference. [Citations.] Malice may also be inferred from the facts establishing lack of probable cause.' " (*Soukup, supra,* 39 Cal.4th at p. 292.) Because we find that defendants had probable cause to file the underlying actions, we need not reach the question of malice. (*Sheldon Appel, supra,* 47 Cal.3d at p. 875 ["If the court determines that there was probable cause to institute the prior action, the malicious prosecution action fails, whether or not there is evidence that the prior suit was maliciously motivated"].)

Disposition

The trial court's order denying defendants' anti-SLAPP motion is reversed. The matter is remanded with directions to enter an order granting the motion to strike and dismissing the action. Defendants shall recover their costs on appeal.

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Pollak, J.

We concur:

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McGuiness, P. J.

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Siggins, J.